THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATIONS NOS 593 AND 595 OF 1999

(Arising from Civil Suit No. 476 of 1999)

Attorney General &
Uganda Commercial Bank Ltd:: Plaintiffs

Versus

Westmont Land (Asia) BHD & 2 Ors:: Defendants

Before: The Hon. the Principal Judge - Mr. Justice J.H. Ntabgoba

RULING

This is a ruling on two applications made in this Court by Westmont Land (Asia) BHD in Miscellaneous Applications Nos. 593 of 1999 and 595 of 1999, both arising from High Court Civil Suit (HCCS (No. 476 of 1999, in which suit the plaintiffs are the Attorney General of Uganda and Uganda Commercial Bank Ltd, and the defendants are Westmont Land (Asia) BHD; Greenland Investments Limited and Greenland Bank, Ltd.

Miscellaneous Application number 593 of 1999 was brought by Chamber summons under Order 9 rule 1 B (1)(h), (2) and (3) of the Civil Procedure Rules, S. 101 of the Civil Procedure Act, and *S.*35 of the Judicature Statute. It seeks Orders that HCCS. No. 476 of 1999 be stayed pending arbitration proceedings and that costs be paid by the plaintiffs/respondents.

Miscellaneous Application number 595 of 1999 was brought by notice of motion under S.17 of the Arbitration Act (Cap.55 Laws of Uganda) Rule 12 of Arbitration Rules SI 55-1, S.1O1 of the Civil Procedure Act, and S.35 of the Judicature Statute. The motion application seeks

the same orders as are sought in the chamber summons (Application No.593 of 1999) aforementioned.

Both applications which were filed in this Court on 27/5/99 give the same grounds of application, namely, that:

1 There exists a binding agreement by the parties to submit their dispute to binding arbitration.

2. There is no sufficient reason why the matter should not be referred to arbitration.

3. The applicant/defendant was ready and willing to participate in the arbitration at the time of filing the suit and remains so.

4. The applicant/defendant has taken no other step in the proceedings.

5. That it is just and equitable to stay the proceedings to enable the parties to undergo arbitration.

It is pertinent to clarify that M/s Greenland Investments, Ltd and M/s Greenland Bank, Ltd, which are co-defendants of Westmont Land (Asia) BHD are not party to the two applications. It is also important to mention that Westmont Land (Asia) BHD (the applicant) was served through its advocates with the summons to enter a defence under Order 9 rule 1 but the applicant has never filed any defence. It is of utmost importance to point out too, that entering of appearance is no longer part of our Civil Procedure rules. It was abolished by the recent amendments to the Civil Procedure Rules as I will be showing later in this ruling. Therefore the filing of a W.S.D. is the first step in the proceedings.

As I have pointed out the suit filed against the applicant, among others, was registered in this Court on 6th May 1999, but the service on the applicant/defendant was effected on 7th May 1999 as is evidenced by the affidavit of service deponed to by one Tumwebaze Keneth Edwin who says he was then an Assistant Process Server in the Ministry of Justice. The applicant filed the notice of intention to defend the suit pursuant to Order 9 rule 1B (1) on 27th May 1999 and it was therefore within the period of 2l days stipulated in the summons. For some unknown reason the notice states that the defendant/applicant has entered appearance even though they, the advocates of the defendant know or ought to have known that entering appearance was abolished. Might it be it was a way of justifying the application for stay of the proceedings which, in S. 17 of the Arbitration Act is conditioned on first entering appearance?

In response to the applicant's notice of motion and chamber summons applications, the Attorney General and Uganda Commercial Bank, Ltd, the respondents, filed replies to the two applications. In the reply to notice of motion, Mr. Christopher Madrama, a Senior State Attorney in the Attorney Generals' chambers, swore an affidavit on 7th June 1999 which was filed in Court the next day the 8th of June 1999. In that affidavit he admitted that there was an agreement between the 1st defendant/applicant and the plaintiffs/respondents. He annexed the agreement to the affidavit. He also annexed to the affidavit a demand notice dated 22nd April 1999 by which due notice was given of the defendant's/applicant's breach of the contracts between them and proposed that the parties submit the dispute to arbitration as per the terms of the breached agreement. The relevant paragraph in the notice reads as follows:

> "As a first step to a resolution, we are proposing that all parties agree to a submission of all these matters to binding arbitration in accordance with the arbitration clauses contained in all the three substantive Agreements. In this respect we must hear from you... (that time prescribed was missed by the photo stating)... If we do not hear from you before the above deadline, we shall proceed with formal legal proceedings against you and to hold you responsible for general and special damages including all legal fees and costs of the law suit."

According to the affidavit of Christopher Madrama (paragraph 5), "the demand notice of 22nd April 1999, gave ten (10) days to the applicant within which to indicate its intentions to agree

to binding arbitration in accordance with the arbitration Clauses" of the Agreements. The affidavit avers in paragraph 7 that the 10 days notice elapsed on May 2nd, 1999 without any indication by the applicant of any intention to agree to a submission to the arbitration. The Ag. Director, Civil Litigation in the Attorney General's chambers wrote to the Counsel for the applicant on 4/5/99 advising that as no response had been received regarding the respondent's proposal for a submission to arbitration, the respondents were to commence civil litigation in the matter. According to Madrama' s affidavit, the letter of Counsel for the applicant indicating it was agreeable to a submission to arbitration was dated 5th May 1999 but the respondents never received it until late in the evening of 6th May 1999 after the respondents had already filed the suit, to wit, HCCS. No. 476 of 1999. (The suit was filed on the same day the letter of counsel for the applicant was received by the case handling officer of the respondents) (See paragraph 10 of Madrama's affidavit). According to Annexture "F" to Madrama's affidavit, Counsel for the respondents indicated that: "We note your client's agreement to submit to binding arbitration in London. However, while the Government of Uganda is also inclined towards arbitration, your notification (of) your clients' intention in that regard reached us after we had instituted formal legal proceedings as we had earlier stated that we would in our Notice of Demand on Thursday 22nd April, 1999."

In the penultimate paragraph of the said annexture 'F' to Madrama's affidavit, the Ag. Director, Civil Litigation stated:

> "In spite of the suit, we can still explore the possibility of a resolution by Arbitration. To that end, a stay of proceedings after issues have been joined could be considered. *Nevertheless, you will appreciate that we must also preserve our rights against the other parties to the suit who cannot be parties to the arbitration."*

So much for the affidavit in reply to the notice of motion application brought by the applicant/first defendant under S. 17 of the Arbitration Act, and Rule 12 of the Arbitration Rules.

With regard to the chamber summons application pursuant to Order 9 (as amended), the respondents, on the same day they filed in Court the reply to the notice of motion application

(i.e. on 8th June 1999) also filed a "Memorandum in Reply to the 1st Defendant's/Applicant's chamber summons". The memorandum was addressed to Court and was accompanied with an affidavit in reply to the chamber summons, which affidavit was sworn also by Mr. Christopher Madrama.

I start with the subject matter of the memorandum. It challenges the chamber summons application as being misconceived and completely without merit. It gives several reasons.

(i) that procedure under Order 9 rule IB(1) relates to disputes as to jurisdiction;
(ii) that an application for stay of the proceedings in HCCS No. 476 of 1999 cannot fall under dispute as to jurisdiction; that it is the subject of S.17 of the Arbitration Act, Cap. 55 of the Laws of Uganda;
(iii) that the expression in relief number (h) of Order 9 rule 1B (1) is to be understood ejusdem generis with the rest of the reliefs preceding it in (a) to (g), namely, disputing to or challenging the jurisdiction of the court;
(iv) that an application under S 17 of the Arbitration Act does not amount to disputing the jurisdiction of the Court.
(v) that the applicant/first defendant ought to have secured his right of the court's audience in HCCS No. 476 of 1999 by filing a defence within the allocated period pursuant to rule 1 of Order 9 of the Civil Procedure Rules.
(vi) that in any case:

(a)the chamber summons application is redundant in view of the existence of the notice of motion application and S.17 of the Arbitration Act which is based on the same ground and seeks the same remedies as does the chamber summons application;
(b) that there are no reasonable grounds for the applicant's preference of staying the proceedings in the suit to putting in a defence and contesting HCCS No. 476 of 1999.

The respondents/plaintiffs, for the above reasons, applied the chamber summons be dismissed with costs; that consequently, court enters an order of default against the first

defendant/applicant for failing to file a written statement of Defence within the time permitted by law.

I entirely agree with Counsel for the plaintiffs/respondents that the chamber summons application is not only bad for duplicity but that it is also misconceived for the reasons appearing in the memorandum as supported by the affidavit of Christopher Madrama sworn on 8th June 1999.

In his rejoinder, Mr. Kibuka-Musoke, learned Counsel for the applicant, contended that in reply to the chamber summons in the viva voce submissions, Counsel for the respondent seems to have abandoned the arguments that the procedure under S. 17 of the Arbitration Act does not fall under the dispute to jurisdiction of the Court. Mr. Kibuka-Musoke ought to have realised that in interlocutory proceedings such as these in which parties rely not on the viva voce evidence of witnesses, but almost entirely on affidavits and addresses of Counsel or litigants, annextures to affidavits form a vital part of the evidence, and as long as they have been annexed, it is not necessarily compelling for a party addressing the Court to refer incessantly to them unless provoked to do so by the opposite side or by the Court. In this case, there is no way court could ignore Mr. Christopher Madrama's affidavit of 7th June 1999, as well as its supplement contained in the memorandum in reply to the 1st defendant(s)/applicants chamber summons. In any case Counsel for the respondent, when provoked by Counsel for the applicant in his submission, replied re-asserting the issue relating to arbitration.

Mr. Kibuka-Musoke attempted to justify his procedure under S. 17 of the Arbitration Act, as a form of dispute to the court's jurisdiction by referring to the words used in paragraph 209 p.155 of Halsbury's Laws of England, 4th Edition Vol. 37 which give a wider meaning to the words "disputing jurisdiction". The paragraph, so far as is relevant to Mr. Kibuka-Musoke's submission reads as follows:- -

"Disputing Jurisdiction generally:

"Disputing jurisdiction" should not be restricted to its literal meaning alleging that the court has no jurisdiction over the defendant in respect of the claim made against him or the relief or remedy sought in the action, but should be given a wider meaning to include allegations of lack of jurisdiction in the court resulting from an irregularity in the writ or other originating process or in the service of process or from leave having been wrongfully granted to serve the process out of the jurisdiction, or to extend its validity for the purpose of service or on any other ground. All these are expressed to be grounds for disputing the court's jurisdiction, but each of them is a separate, alternative independent ground which can be relied on to dispute the Courts jurisdiction or to object to any such irregularity which would deprive the Court of jurisdiction, although, of course, the applicant may rely upon two or more of these grounds either cumulatively or in the alternative. For greater convenience, all those grounds have been gathered into one rule, and thus has enabled any dispute relating to jurisdiction of the court to be regulated by the same, single, simple rule..."

In my understanding, the above words which I have quoted are, in effect, referring to the grounds in rule 1A of Order 9 of our Civil Procedure Rules, and, I respectfully agree with paragraph on page 2 of the respondent's/plaintiff's memorandum in reply to 1st defendant's chamber summons that:

> "It seems that Westmont may be relying on the expression "any other ground" under rule 1B (1)(h), but such expression ought to be read ejusdem generis with the entire rule. It does not permit objections on every conceivable ground as the applicant appears to construe it. For the objection to be meritorious under this rule it is obvious that there must be some form of *irregularity in the summons, the service of summons or other element of impropriety of the summons such as to defeat the Court's jurisdiction..."*

With respect, the application under Rule 1B (1) of Order 9 does not envisage a matter such as the procedure under the Arbitration Act, S. 17 and Rule 12 of the Rules there under, which is a matter of substance not procedure. Rule 1B (1) is about objection to jurisdiction of the court relating to the service of summons under Order 9 Rule 1. The wide interpretation of the words "disputing jurisdiction" should not be extended beyond that of summons under Order 9 rule 1. I think it is pertinent at this juncture to quote from the words at p.14 of a book entitled

"COMMERCIAL ARBITRATION) (2nd Edition) by Sir Michael J. Mustill and Stuart C. Boyd which are that:

> "Where the parties have agreed to submit their differences to arbitration, the Court is usually concerned only with the procedural aspects of the dispute. *But on occasion the court may be required to decide upon the substantive merits; for the existence of an agreement to refer to arbitration is not an objection to the jurisdiction of the Court,* but merely a reason the court may, and in certain circumstances must, abstain from exercising that jurisdiction. *This has a number of consequences. The most important is that an action may properly be commenced in an English court in respect of a dispute falling within the valid and subsisting agreement to arbitrate. Moreover, since the presence of an English arbitration clause will ordinarily justify the inference that the parties wish the dispute to be governed by English law, the Court will in principle often have jurisdiction to entertain an action against a party resident abroad".* (Underlining provided for emphasis).

An application under S. 17 of the Arbitration Act is some what analogous to an application under S.6 of the Civil Procedure Act, in so far as they are both about stay of suits or proceedings pending some other proceedings. S.6 of the Civil Procedure Act provides for a stay of one of two pending suits or proceedings if both are between two parties or parties suing under them. It provides that:

> "No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Uganda to grant the relief claimed."

In such case a party cannot apply for stay of the subsequent suit by bringing an application in challenging the jurisdiction of the Court under Order 9 rule 1B (l) of the Civil Procedure Rules. So also with application under S.17 of the Arbitration Act, the Rule does not apply.

The underlining emphasis I have provided above is intended to remove any doubt as to the competence of the Court to entertain a matter that has been submitted for arbitration if the circumstances of the case so warrant. If there are any circumstances which warrant a matter to be entertained by the Court, they exist in the present case in which, because of the abolition of entering of appearance by our rules, the procedure under S. 17 of the Arbitration Act is uncertain, if not impossible.

In view of those circumstances then, must the parties insist on going in for arbitration, come rain, come sunshine? In my considered opinion where there exist two alternatives of course to be taken and one of those alternatives is either uncertain, or cumbersome or impossible, it is only reasonable to take the certain and sure alternative course. In this case, clearly the procedure under S. 17 of the Arbitration Act was not possible in view of the apparent impendiment created by the abolition of entering of appearance in our Civil Procedure Rules. Therefore the certain and sure course to take was the alternative readily available of filing a defence and be ready to contest H.C.C.S No. 476 of 1999. The defendant should have therefore filed a W.S.D. within the provisions of Order 9 rule 1 of the new Civil Procedure Rules. In any case, as Dr. Sempasa observed, the applicant has advanced no other reasons why it should have insisted on proceeding under S.17 of the Arbitration Act than that the parties submitted to arbitration. Yet, when the parties submitted to arbitration they knew or should have known that such course was impossible. The impossibility was the disappearance from the Civil Procedure Rules of entering into appearance. The insistence to proceed through an impossible procedure was most unreasonable and, as stated by Counsel for the plaintiffs respondents, the applicant/defendant opted for the duplicitous course at its own peril.

At this juncture, I must note the apparent desperate and dishonest argument of Counsel for the applicant to imply that his clients' filing of the intention to Defend the suit amounted to entering of appearance. With great respect, such an argument is as untenable as it is misconceived. The fact is that as a consequence of the 1998 amendments to the Civil Procedure Rules by removing entry into appearance from Order 5 rule 1 sub-rule (2), the filing of a W.S.D. is now the first step in the proceedings. That is the reason why the several amendments to Order 9, while retaining the procedure of a W.S.D., provided such that when

the defendant proceeds in disputing to jurisdiction via Rule 1B, the filing of a written statement of defence is treated as provisional, in the sense that its effect of submitting to jurisdiction is suspended until under rule 1B (5) the application under rule 1B (1) does not materialise, when then the W.S.D. takes effect in the usual sense. This is the essence of sub rules (5) and (6) of Rule l B of Order 9; and that is why Rule 1A provides that:

> "The filing of a defence by the defendant shall not be treated as a waiver by him of any irregularity in the summons or service of the summons or in any order giving of the jurisdiction or extending the validity of the summons for the purpose of service."

I dare say that Rule 1A of Order 9 is full proof that the filing of intention to defend under rule 1B (1) is not the equivalent of the entering of the appearance that was abolished. The entering into appearance that has been abolished did not serve the same purpose as the notice to defend introduced in Rule 1B (1).
I have gone out of my way to give this detailed explanation to rule out the apparent misconception of learned Counsel for the applicant that his client's filing of intention to defend amounted to the entering of appearance required to have been made as a condition for basing an application upon S. 17 of the Arbitration Act. The reality of the situation is that there being no appearance to enter, the applicant defendant was handicapped in applying under S.17 of the Arbitration Act. He could not take that procedure. Open to him was entering a defence and contesting H.C.C.S. No. 476 of 1999. That entering of the defence could only be valid if it was filed in the time prescribed by law. But the applicant/defendant could have applied to court for extension of time within which to file a defence. Such course is possible in the law. As matters stand, the defendant's application of Order 9 rule 1 B (1) was misdirected and misconceived, as was his futile attempt to file a motion application under S. 17 of the Arbitration Act, which I rule was impossible and of no effect.

As regards the chamber summons application, the same was also misconceived as the applicant/defendant could not argue it when it was not party to the suit out of which it arose. It was not party thereto because, by failure to file a defence within the prescribed period, it took itself out of the jurisdiction of the court.

But there are other matters of procedure which were challenged by Mr. Kibuka-Musoke, learned Counsel for the applicant. I must deal with them before reaching a final conclusion. These are objections raised by Counsel in the course of the hearing regarding the service and filing of certain documents. In fact it was an affidavit of service sworn by one Tumwebaze Keneth Edwin on 31st May 1999. The Court Registry stamp upon it shows that it was filed on 4th June 1999 and so does the stamp of the cashier who received the filing fee. It depones, inter alia, that "on the 7th May 1999 I went to the chambers of M/s Shonubi, Musoke & Co. Advocates situated at Bauman House, 1st Floor and served the said summons with the annextures attached upon Mr. Shonubi of M/s Shonubi, Musoke & Co. Advocates Counsels for the 1st defendant who duly signed and dated the stamp on it...."

Mr. Kibuka-Musoke concedes that his firm was duly served but contends that the summons should have been, but was not, filed in court prior to the filing of the application for judgment in default. He relied in his argument on the provisions of rule 3 of order 9 which stipulates:

> "3. Where any defendant fails to file a defence on or before the day fixed in the summons and the plaintiff is desirous of proceeding upon default of filing the defence under any of the rules of this order, he shall cause an affidavit of service of summons and failure of the defendant to file a defence within the prescribed time to be filed upon the record.."

Admittedly, the above affidavit of Tumwebaze Keneth Edwin does not state that the defendant failed to file a defence within the prescribed time. What is clear is that it avers that Counsel for the defendant was served on 7th May 1999. But the affidavit of Christopher Madrama, read together with the Memorandum in reply to 1st defendant/applicant's chamber summons clearly states that the defendant failed to enter appearance within the prescribed time. This is contained in the last paragraph of the memorandum signed on 8th June 1998 the very day Madrama deposed to his affidavit in reply to the chamber summons. We cannot ignore the affidavit of Tumwebaze filed on 21st June 1999 albeit later than the filing of an application for a default judgement on 8th June 1999. That affidavit, although challenged as to validity, as I will come to later, depones that the summons were issued and served on the defendant, respectively on 6th and 7th May 1999 (see paragraph 3), and that the defendant which was given 21 days in which to

file a defence has not since filed one. I therefore hold that rule 3 of Order 9 was complied with so that an affidavit was filed prior to the application for a default judgement; the combined effect of that affidavit and the one of Madrama of 8th June with its memorandum, served the purpose of the provision in the rule that not only the affidavit was filed but that also it was mentioned that the defendant failed to enter a defence within the time prescribed in the law and summons.

Mr. Kibuka-Musoke, in his challenge to Tumwebaze's affidavit of 31st May and filed on 4th June 1999, implied that the affidavit cannot have been filed on 4th June 1999, prior to the application for a default judgement because when he checked on the court record on 16/6/99 the affidavit was not on and that, in any case, it appears much later as item 19 of 21st June 1999 on the Chronological record of events appearing at the back of the Court file. Mr. Musoke, impliedly, means that the stamp of 4th June 1999 of the Registry must have been back-dated. The fact that the affidavit does not appear on the chronological record earlier than 21st June 1999 was explained, to my satisfaction by Dr. Sempasa. He says that after filing the affidavit and paying the fee, and having had the document accordingly stamped with the date of payment of the fee and of filing in the registry, the affidavit was inadvertently left by the Registry staff to be taken by the plaintiffs/respondent's filing officer. Dr. Sempasa explains, in fact, that the affidavit of Tumwebaze keneth Edwin which he deponed to on 11th June 1999 and filed on 21st June 1999, and appears as item 19 of 21st June 1999 on the Chronology at the back of the file was sworn to aver the service of summons and the allegation of the defendants failure to file a defence as prescribed. Dr. Sempasa's explanation, in my judgement, shifted the burden onto Mr. Kibuka-Musoke to adduce evidence to support his allegations of a probable collusion between Counsel for the plaintiffs/respondents and the registry staff to make improper records. Such allegations by Counsel were so grave that they required substantiation. May be Counsel should have adduced a receipt or payment voucher issued by the registry to show that the fee was paid later than the document is showed to have been filed. As Counsel observed these days the registry records are in order. If that is so, then payment of fees later than claimed would be reflected in the cash books.

But more attacks were made on the affidavit of Tumwebaze Keneth Edwin filed on 2 1/6/99 as being fatally defective in many ways. Apart from those I have disposed of, Counsel says

that some paragraphs of the affidavit stated that he deponed to them to the best of his knowledge, information and belief. Counsel contends that it is trite law that affidavits must disclose the grounds of the information and belief of the deponents; and that Mr. Tumwebaze's affidavit failed to disclose his source of information and belief. Counsel Kibuka-Musoke stated:

> "We do not know the facts which are within the deponent's knowledge, those within his information and those within his belief."

Counsel is correct that, on the authority of A.N. Pharkey - vs - Worldwide Agencies Ltd (1948) 15 EACA 1, the deponent, Mr. Tumwebaze should have, in his affidavit, disclosed the source of his information and belief. He did not and, ordinarily, his affidavit should be disregarded. But the affidavit happens not to be the sole source of the information he was deponing to. The affidavit of Christopher Madrama, read together with the memorandum in reply to the first defendant's chamber summons, does disclose the information that the applicant defendant was served with summons to enter a defence and that it failed to respond in time or at all. Besides, Counsel for the defendant acknowledges his firm having received the summons, and he does not say that he put in his defence timely, nor has he even applied for extension of time to enable him put in the defence. I would in fact say that the matter deponed by Tumwebaze Keneth Edwin is common knowledge. What then does the applicant want? Is it possible to allow it to contest a suit to which it is not a party merely because the affidavit in question is defective and should be ignored. To do that would be setting a precedent that would be dangerous to our elaborate rules of procedure. The Counsel's challenge to the affidavit of Tumwebaze Keneth Edwin can be of no aid to the applicant, who clearly failed to put in a defence.

In view of the above reasons, I have no alternative but to strike out both applications. I do strike them out with costs. Consequently, the applicant is without a defence and since it has not even bothered to apply for more time within which to file a late defence, I enter a default judgement infavour of the plaintiff against the first defendant.

The plaintiffs will have to take out a date for hearing for the purpose of formal proof in respect of the unliquidated damages prayed for in the plaint.

J.H. Ntabgoba Principal Judge

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